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No. 82-1532

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALYESKA PIPELINE SERVICE COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the former Court of Claims erred in holding that petitioners were barred from asserting their claim because they had impermissibly split their cause of action.

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OPINION BELOW

The opinion of the former Court of Claims (Pet. App. 1a-11a) is reported at 688 F.2d 765.

JURISDICTION

The judgment of the former Court of Claims was entered on September 8, 1982. The Court of Appeals for the Federal Circuit denied a petition for rehearing on December 15, 1982 (Pet. App. 15a).[1] The petition for a writ of certiorari was filed on March 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1]On October 1, 1982, after entry of judgment in the former Court of Claims, Congress enacted the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 *et seq.*, which abolished the Court of Claims and established the United States Claims Court and the United States Court of Appeals for the Federal Circuit. The petition for rehearing was filed in the latter court on October 22, 1982.

STATEMENT

1. Petitioners own and operate the Trans-Alaska Pipeline System. In 1969, petitioners applied to the government for a right-of-way to build a pipeline to transport oil across Alaska. Thereafter, opponents of the pipeline project instituted litigation which delayed the granting of the right-of-way.[2] In order to expedite the project, Congress in 1973 enacted the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1651 *et seq.* ("TAPS Act").[3] On January 23, 1974, the Secretary of the Interior and petitioners entered into an "Agreement and Grant of Right-of-Way for Trans-Alaska Pipeline." See *Alyeska Pipeline Service Co.* v. *United States*, 624 F.2d 1005, 1008 (Ct. Cl. 1980) ("*Alyeska I*"). The pipeline is now completed.

2. In November 1973, the Secretary billed petitioners $12,253,730 for costs incurred in connection with processing petitioners' right-of-way application. *Alyeska I, supra*, 624 F.2d at 1008. This amount, which was paid by petitioners, represents costs incurred prior to the passage of the TAPS Act. In addition, petitioners paid another $13,691,980 for costs incurred by the government after the enactment of the TAPS Act but before June 1975, when the Secretary promulgated regulations authorizing reimbursement for costs incurred by the government.[4]

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[2]See *Wilderness Society* v. *Morton*, 479 F.2d 842 (D.C. Cir.), cert. denied, 411 U.S. 917 (1973); see also *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

[3]The TAPS Act was largely intended to supersede the outcome of the prior litigation. S. Rep. No. 93-207, 93d Cong., 1st Sess. 1-2 (1973).

[4]The government billed petitioners a total of $38,930,438 in costs and fees through the "transition" quarter following fiscal year 1976 (Pet. App. 3a). The present action, however, is concerned only with the $13,691,980 paid by petitioners for costs that accrued between the passage of the TAPS Act (November 1973) and June 1975.

3. After unsuccessfully seeking a refund from the Secretary for part of the amount paid, petitioners filed an action in the United States Court of Claims in August 1978 to recover monies which, they alleged, had been illegally exacted (Pet. App. 3a). Petitioners subsequently amended their petition in February 1979. As the court below noted, the amended petition contained three claims (*ibid.*; emphasis added):

> The first claim sought a refund of the entire $12,253,730 payment made to the government for costs incurred prior to the passage of the TAPS Act because no regulations authorized collection of that sum. The second claim (an alternative to the first) challenged the government's entitlement to particular items of that $12,253,730. The third claim challenged specific charges levied after passage of the TAPS Act. *The third claim, however, did not challenge the government's authority to charge the plaintiffs for costs and fees after passage of the TAPS Act at a time when there were no authorizing regulations.*

Petitioners and the government filed cross-motions for summary judgment on the first and second claims.[5] On May 28, 1980, the Court of Claims entered summary judgment in favor of petitioners on their first claim (*Alyeska I, supra*, 624 F.2d at 1018), holding that the government was without authority to collect the $12,253,730 because no regulation had authorized such action (*id.* at 1009-1010).[6] The court did not address the second claim because the sums sought therein were subsumed within the first claim (*id.* at 1007 n.2).

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[5]The government also unsuccessfully sought dismissal of the petition for lack of jurisdiction.

[6]The court relied on the Independent Offices Appropriation Act, 1952, 31 U.S.C. 483a, for its finding that charges imposed for costs incurred in connection with the issuance of "license[s], permit[s]

4. In October 1980, partial final judgment was entered on the first claim (Pet. App. 4a). Thereafter, the government filed a motion for relief from judgment. The government's motion was grounded on a dispute over the applicability of language added in 1978 to the general discharge provision of 28 U.S.C. 2517(b), which describes the legal effect of payment of judgments rendered by the Court of Claims[7] on other claims arising out of the same case or controversy. Prior to the 1978 amendment, Section 2517(b) provided that payment of such judgments "shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy." Section 14(f) of the Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2390, amended the general discharge rule of Section 2517(b) by providing that it would apply "unless the judgment is designated a partial judgment, in which event only the matters described therein shall be discharged." 28 U.S.C. (Supp. V) 2517(b).

The government argued that the qualifying language of 28 U.S.C. (Supp. V) 2517(b) applied only to cases brought under the Contract Disputes Act and, therefore, because the language did not apply to the present action, payment of the judgment on petitioners' first claim would be a full discharge to the United States of the remaining claims (*i.e.*, the third claim of the amended petition). The court rejected the government's argument and held that the qualifying

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* * * or similar thing[s] of value or utility" must be authorized by regulation (624 F.2d at 1009-1010). In so doing, the court rejected the government's argument that the TAPS Act was the governing statute with regard to the Secretary's authority to charge costs and fees (*id.* at 1010-1016).

[7]Since its amendment by Section 139(k) of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 43, Section 2517 now refers to judgments rendered by the United States Claims Court. See note 1, *supra*.

language of 28 U.S.C (Supp. V) 2517(b) added in 1978 is not limited to cases brought under the Contract Disputes Act but instead applied in the instant action and thus prevented the government's payment of partial judgment from discharging the remainder of petitioners' case (Pet. App. 12a-14a). The partial final judgment was subsequently paid by the United States (Pet. 4).

5. After receiving judgment on their first claim, petitioners amended their petition again in March 1981. The amended petition, as described by the Court of Claims (Pet. App. 5a), added two claims which were not before the court when it decided *Alyeska I*:

> The second amended petition added new third and fourth claims and designated the third claim as the fifth claim. The new third claim (the subject of the present motions [for partial summary judgment]) seeks recovery of the $13,691,980 costs and fees the government collected between the passage of the TAPS Act in November 1973 and the promulgation in June 1975 of regulations authorizing the collection of costs and fees, on the ground that the Secretary had no authority to do so except pursuant to regulation.

Cross-motions for summary judgment were filed on the new third claim, with the petitioners arguing that the rationale of *Alyeska I*, barring collection by the government of application processing and monitoring costs in the absence of authorizing regulations, applies beyond the date of enactment of the TAPS Act up until the promulgation of such authorizing regulations (Pet. App. 5a). At oral argument, however, the court *sua sponte* raised the question whether petitioners should be barred from asserting their new third claim on the ground that petitioners had impermissibly split their cause of action. Both sides were allowed to submit supplemental briefs on the question.

6. In the decision under review, the Court of Claims granted the government's cross-motion for summary judgment and dismissed petitioners' new third claim (Pet. App. 1a-11a). The court reasoned that petitioners had improperly split their claim because (1) the new third claim and the first claim (the subject of *Alyeska I*) "are parts of a single indivisible claim" (*id.* at 6a); (2) both claims rest on the same legal theory and arose out of the same transaction; and (3) petitioners could have asserted their new third claim before the decision in *Alyeska I* (*id.* at 7a).

The court rejected petitioners' argument, based in part on 28 U.S.C. (Supp. V) 2517(b), that the rule against splitting a cause of action usually does not bar other aspects of the same action that are not reached in the partial final judgment. The court held that the instant case was an exception to the general rule because the court was not aware of the new third claim when it decided *Alyeska I* (Pet. App. 9a). The court noted (*ibid.*) that it had "believed that the partial judgment in *Alyeska I* would discharge all the [petitioners'] existing claims that involved a challenge to the Secretary's authority to impose charges in the absence of regulations." In light of the fact that the petitioners did not challenge the court's statement in *Alyeska I* that petitioners were not disputing their obligation to reimburse the government for costs incurred after the enactment of the TAPS Act, the court held that the new third claim, which *did* dispute petitioners' obligation to reimburse the government for post-TAPS Act costs, and which was not asserted until *after* judgment in *Alyeska I*, came too late (Pet. App. 9a-10a).

ARGUMENT

The decision of the Court of Claims is correct, does not conflict with any decision of this Court or any court of appeals, and does not warrant further review.

1. Petitioners erroneously assert (Pet. 5; footnote omitted) that this case presents the following question:

> In amending 28 U.S.C. § 2517(b), did Congress consent generally to the entry and payment of partial final judgments against the United States in all Tucker Act cases in the United States Claims Court, or did Congress merely consent to the entry and payment of such judgments in cases brought under the Contract Disputes Act of 1978?

Contrary to petitioners' assertion, the decision below (*Alyeska II*) does *not* raise this issue. As petitioners have acknowledged (Pet. 3, 7), the Court of Claims previously resolved the issue when, in denying the government's motion for relief from judgment in March 1981, it held that 28 U.S.C. (Supp. V) 2517(b) authorizes the entry and payment of partial final judgments in all cases before the court (Pet. App. 12a-14a). The Court of Claims expressly noted in *Alyeska II* (Pet. App. 9a) that final judgment on petitioners' first claim has been entered pursuant to 28 U.S.C. (Supp. V) 2517(b).[8]

2. The question that is presented by *Alyeska II* is whether petitioners should be barred from asserting their new third claim on the ground that, by not asserting the claim in conjunction with their first claim, they have impermissibly split their cause of action. Petitioners assume *arguendo* that a split cause of action is involved (Pet. 4 n.3),[9] but argue that

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[8]Because this case does not concern the issue of the extent to which the United States has consented to be sued under the Tucker Act, 28 U.S.C. (& Supp. V) 1346 and 1491, the cases cited by petitioners (Pet. 4-5) concerning that issue are inapposite.

[9]Although petitioners state that they are assuming *arguendo* that they split their cause of action, they nevertheless also argue that their new third claim "was for different amounts, paid at different times, to reimburse Respondent for different activities than in the first claim * * *" (Pet. 7). The Court of Claims, however, found the new third

28 U.S.C. (Supp. V) 2517(b) allows the splitting of a cause of action and the assertion of the new third claim.

It is undisputed that the qualifying language of 28 U.S.C. (Supp. V) 2517(b) allows claims to be pursued after a partial judgment has been entered in a case. The court in *Alyeska II* expressly recognized this effect of 28 U.S.C. (Supp. V) 2517(b) when it remanded the case for further proceedings on the fourth and fifth claims (see Pet. App. 11a). The fifth claim, which originally was the third claim of the first amended petition,[10] would have been discharged upon entry of judgment in *Alyeska I* but for the qualifying language of 28 U.S.C. (Supp. V) 2517(b).

Although 28 U.S.C. (Supp. V) 2517(b) prevents the discharge of pending claims that remain after partial final judgment has been entered, the Court of Claims correctly concluded (Pet. App. 5a-6a) that the statute does not entitle a party to bring "a subsequent action on the same claim, or any part of the claim that was, or reasonably could have been, brought in the initial action." As this Court has repeatedly held, a judgment on the merits "merges" all

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claim and the claim in *Alyeska I* to be parts of a single indivisible claim, arising out of the same transaction and resting upon the same legal theory (Pet. App. 6a-7a). The court held (*id.* at 7a) that "[i]t is consistent with the expectations of the parties to treat as a single claim all of the [petitioners'] claims based upon the government's assessment of costs without authorizing regulations made prior to the filing of the amended petition in 1979."

[10]Petitioners convey the impression that the third claim of their first amended complaint (Pet. 3) is the same third claim that is the subject of this case (*id.* at 4, 7). As previously noted, however, the claim before the court in this case was not raised until *after* judgment had been entered in *Alyeska I*. This distinction between the claims is critical: whereas petitioners, pursuant to 28 U.S.C. (Supp. V) 2517(b), may pursue the third claim of their first amended petition (now the fifth claim) after receiving partial final judgment on their first claim, they may not, for the reasons stated in *Alyeska II*, assert their new third claim at this stage in the proceedings.

claims theretofore accrued and precludes the parties from subsequently litigating further claims based on the same cause of action. See *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981); *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); *Montana* v. *United States*, 440 U.S. 147, 153 (1979); *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948). Petitioners could have asserted the third claim of their second amended complaint prior to the decision in *Alyeska I* but instead waited until after judgment had been entered. It is well settled that "if the claimant, before filing its first suit, is in possession of all the facts on which its second suit is based, the splitting of the claims into multiple suits is fatal to maintenance of the later-filed action." *Everett Plywood Corp.* v. *United States*, 512 F.2d 1082, 1087 (Ct. Cl. 1975).[11] The addition in 1978 of the qualifying language of 28 U.S.C. (Supp. V) 2517(b) does not permit petitioners to circumvent the rule against splitting a cause of action by presenting a claim that could and should have been raised earlier.

3. Petitioners also argue that the partial final judgment entered on their first claim should not bar the assertion of their new third claim because the rule against splitting causes of action is usually applied when the split claim is raised in a subsequent separate proceeding. The policy against multiple and piecemeal litigation, a principal rationale underlying the split cause of action rule (see *Brown* v. *Chaffee*, 612 F.2d 497, 504 (10th Cir. 1979)), is equally applicable to claims raised following partial judgment in a single case as to claims raised in a subsequent separate

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[11]The split cause of action rule is an application of the doctrine of res judicata, since res judicata, or "claim preclusion," prevents litigation of claims which could have been, but were not, litigated previously. See *Restatement (Second) of Judgments* §§ 18, 19, 24(1) (1980).

action.[12] If petitioners in the instant case had not split their cause of action, both claims could have been resolved in *Alyeska I*. Thus, as the Court of Claims noted (Pet. App. 10a), petitioners easily come within the rule against splitting causes of action:

> The effect of the [petitioners'] splitting of their claim has been to require the parties and the court to expend additional time and effort to consider unnecessarily an issue that could and should have been resolved in the earlier proceeding. One of the purposes of the rule against claim splitting is to prevent that situation.

This Court recently applied this rule in *Arizona* v. *California*, No. 8 Orig. (Mar. 30, 1983), slip op. 9-22, when it held that a prior determination of Indian water rights to the waters of the Colorado River, based upon a calculation of practicably irrigable acreage, precluded reopening and relitigation of the irrigable acreage issue. The Court's decision, which rests on principles of res judicata, includes language similar to the language of *Alyeska II* quoted above:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

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[12]Petitioners contend (Pet. 8-9 & n.7) that the decision below is inconsistent with the Court of Claims' prior decisions that hold that a plaintiff may avoid splitting his cause of action by amending his pleadings to include all claims in one action. In the cases cited, however, the additional claims were included by amendment of the petition *prior* to entry of judgment on the initial claim. See *Everett Plywood Corp.* v. *United States, supra; Nager Electric Co.* v. *United States*, 368 F.2d 847, 856-857 (Ct. Cl. 1966); *Electric Boat Co.* v. *United States*, 81 Ct. Cl. 361, 367-368 (1935), cert. denied, 297 U.S. 710 (1936).

Slip op. 13 (quoting *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979)). The Court also held that the fact that other matters were still pending when the United States moved to reopen the irrigable acreage issue did not undermine the finality of the prior irrigable acreage determination. Slip op. 11 n.7 (citing *Restatement (Second) of Judgments* § 13 comment e (1980), which states that "[a] judgment may be final in a res judicata sense as to a part of an action although the litigation continues as to the rest").

4. Petitioners' final argument is based on the fact that the court *sua sponte* raised the split cause of action issue at oral argument. Petitioners allege (Pet. 8) that they "never knew why the court viewed the cause of action as split until the court * * * issued its opinion * * *." Dismissal of the new third claim under such circumstances, petitioners assert (Pet. 8-9), constitutes a denial of procedural due process and calls for this Court to exercise its supervisory power to correct the alleged procedural deficiency.

The only authority cited by petitioners in support of this argument, *Jefferson Fourteenth Associates* v. *Wometco de Puerto Rico, Inc.*, 695 F.2d 524 (11th Cir. 1983), is inapposite. In that case the court of appeals held that the district court had deprived a third party plaintiff of its right to procedural due process by *sua sponte* dismissing its action on the merits without providing it an opportunity to develop the facts supporting its claim or to complete its pleadings. 695 F.2d at 526-527. In contrast, the merits of petitioners' new third claim were fully presented to the court below. In addition, petitioners were made aware at oral argument that the court was concerned with the issue of whether they had split their cause of action between *Alyeska I* and the present action (Pet. App. 5a). At the invitation of the court, petitioners submitted two briefs (one in reply to the government's brief) on the issue prior to the court's decision. Following the decision, petitioners sought

rehearing, contending that the court erred in ruling that petitioners had split their claim. The petition for rehearing was denied (Pet. App. 15a). In these circumstances, petitioners clearly were afforded due process in litigating their claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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